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IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON, et al.,

Appellants,

v.

SEATTLE SCHOOL DISTRICT No. 1, et al.,

Appellees,

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

This brief is submitted pursuant to Rule 16(5) in opposition to the Motion to Dismiss or Affirm filed by the school districts and other original plaintiffs in the District Court. We here address questions 1, 2 and 3 of that Motion only. We do not address question 4 presented in the districts' Motion, nor do we find it necessay to reply to the motions of the various intervenor plaintiffs.

ARGUMENT

I. PROPER CRITERIA FOR DETERMINING EXISTENCE OF INVIDIOUS RACIAL CLASSIFICATION

Throughout the districts' Motion to Dimiss or Affirm

("SSD Motion"), there runs a single major theme. Initiative 350 establishes an invidious racial classification. Accordingly, for purposes of the Fourteenth Amendment, it should be treated in the same manner as a law which requires separate schools, or separate eating facilities, or separate parks, for different racial groups. (See SSD Motion, pp. 13-32). In fact, that is exactly how the Court of Appeals and the District Court did treat it.

But did those courts use the proper criteria for determining whether an invidious racial classification exists? That is the single most important issue in this case. It is important because of the practical consequences which flow from how that issue is resolved. For if a law having the effect of prohibiting student transportation for racial balance does indeed result in a prohibited racial classification, that classification has at least two very interesting and unusual features.

First, the typical racial classification always denies members of the targeted racial group or groups a certain freedom of choice. By reason of their race, for example, they cannot go to a certain school, eat in a certain part of a restaurant, or vote in certain elections. But Initiative 350, in contrast, has no such effect. Indeed it was, instead, the decision of the Seattle School District, in adopting the Seattle Plan, which denied to members of specified racial groups their freedom of choice; *i.e.*, the choice to attend their neighborhood school no matter what their race might be. Concisely, Initiative 350 restored that freedom. Rather than create the usual sort of racial classification it thus eliminated one.

Secondly, members of racial minorities themselves, quite understandably, want the very type of freedom of choice which the Initiative restored. A nationwide survey in evidence in this case confirms that a majority of Black Americans now oppose forced bussing. Ex. A-133, pp. 37-41. The situation is no different in Seattle. As stated by the District's own Superintendent:

> "If you get out in your Asian community, your Black community, you will find a lot of opposition to it (forced bussing). It's not a popular thing." (Ex. A-118, p. 148)

Similarly, Dr. Tone of the Tacoma School District, a co-plaintiff below and a co-appellee here, testified that as many as 95 percent of all parents, majority and minority, with whom he came into contact expressed a preference for neighborhood schools. (RT, p. 391)

And again, Dr. Childers of the Pasco School District, another co-plaintiff and co-appellee, testified that if minority parents in that district had a choice, they would choose their neighborhood schools. (RT, pp. 634-638)

Thus, even within the minority communities, as well as the majority communities, there is a profound split on the issue of the supposed blessings of forced bussing. But, by holding that Initiative 350 constitutes an invidious racial classification, the lower courts have effectively held that the Fourteenth Amendment places this issue off-limits to the voters of Washington State or their elected representatives.

This, we submit, subverts entirely the precious values embodied in the Fourteenth Amendment.[1] And this is why this case is so important, and merits full review by this Court.

II. STANDARD FOR DETERMINING EXISTENCE OF A RACIALLY DISCRIMINATORY PURPOSE

Next, two related points raised by the school districts merit comment. First, they assert that the Initiative "legislatively differentiates between student assignment for the purpose of school desegregation and student assignments for any other significant reason" (SSD Motion, p. 3). They

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[1]Note, in this regard, that the major issue in this case is identical to the major issue in *Crawford v. Board of Education of the City of Los Angeles*, No. 81-38, (Pet. for Cert. filed July 8, 1981). The thrust of the Petition for Certiorari in *Crawford* and that of the Motion to Dismiss or Affirm in this case are identical: Any state law which has the effect of impeding or stopping a program to achieve racial balance in schools, even though the program is not required by the Fourteenth Amendment, constitutes a racial classification prohibited by the Fourteenth Amendment. See the discusssion at pp. 17-27 Petition for Certiorari in *Crawford*, under the heading: "Proposition I is an Explicit Racial Classification Violative of the Equal Protection Clause of the Fourteenth Amendment."

correctly point out that the lower courts agreed with this assertion, but incorrectly state that we agree with it as well. (SSD Motion, p. 3).

As emphasized in the Amicus Brief filed by our sister states in this case,[2] the initiative prohibits all bussing which cannot be justified by specific needs of specific students, and the inability of a specific neighborhood school to meet those needs. Surely, as shown by Justice Powell's opinion in *University of California Regents v. Bakke*, 438 U.S. 265, 315-320, such a requirement of "individualized consideration without regard to * * * race" promotes, rather than offends, the values embodied in the Fourteenth Amendment. See, 438 U.S. at 318, n. 52.

In *Bakke*, of course, a special medical school admissions program for minorities was struck down. But assume that it had been upheld instead. Could the voters of California have then eliminated it? And if they could not, could the Regents of the University of California, who had instituted the program in the first place, have done so? Would such action have constituted an impermissible racial classification, or be invalid by reason of an impermissible discriminatory purpose?

This example illustrates the issues we raise in the first of our questions presented. And the school districts' response only shows the analytical confusion in which they are foundering. They state:

> "There may well be situations in which a local school board decision to voluntarily desegregate may be rescinded without violating the fourteenth amendment." (SSD Motion, p. 25).

They then go on:

> "But such a program may not be discontinued by the passage of state legislation which creates an impermissible racial classification." (Ibid.)

Of course not. But that begs totally the critical question we are raising: Why would not the decision of the local school board itself create an impermissible racial classification, or be evidence of an illicit discriminatory

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[2]See Brief of Amici States of Arizona, Kansas, Nebraska and Utah in Support of Jurisdictional Statement, p. 10.

purpose? Are the criteria for determining classification and purpose when the state makes the decision different from those which are applicable when the local board makes the decision? If so, why? And what are those differences?

The same analytical confusion is apparent in the school districts' further discussion of the criteria for determining a racially discriminatory purpose. They refer, for example, to "the measure's intent to undo Seattle's desegregation plan." (SSD Motion, p. 34).

But what if the local school board itself decides to undo the desegregation plan? Why is that not likewise an impermissible purpose? The school districts do not tell us.

III. A TRIGGERING COURT ORDER, EVEN IF REQUIRED, WOULD NOT RESULT IN CONSTITUTIONAL INVALIDITY

Finally, a word about the so-called "overbreadth" issue. (SSD Motion, pp. 41-47). The argument of the school districts is that the Initiative is unconstitutional because it requires a court finding of a violation of the Fourteenth Amendment before a school district may use forced bussing to achieve racial balance. This is so even if the district itself may think it has committed illegal acts of segregation.

Even if that interpretation of the Initiative is correct, and we do not concede here that it is,[3] this does not make it unconstitutional. The prerequisite of a triggering court order was not found to be constitutionally objectionable, for example, in *Brown v. Califano*, 627 F.2d 1221, 1227, n. 28 (D.C. Cir. 1980).[4]

This same point is perhaps best made by Justice Powell's opinion in *Bakke, supra*, as follows:

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative

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[3]See, J.S., pp. 4, 21.

[4]See also Memorandum for the United States, p. 8, n. 1.

findings of constitutional or statutory violations. [438 U.S. at 307].

"* * *

"* * * Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

"Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. * * *" 438 U.S. at 308, 309.

That the Initiative puts the Seattle School District in essentially the same position as this Court thus put the University of California should hardly be considered a constitutional infirmity.

CONCLUSION

For the reasons given above and in our Jurisdictional Statement, the questions presented on this appeal are substantial; and this Court should, accordingly, note probable jurisdiction.

DATED this 18th day of September, 1981.

Respectfully submitted,

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